THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-15-568

STATE OF MAINE
APPELLEE

v.

MICAH DAY
APPELLANT

ON APPEAL from the Cumberland County Unified Criminal Court

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Cases

Statutes

Rules

Treatises

Other Authorities

INTRODUCTION

Statutes and the will of the Legislature do not trump the Fourth Amendment. Yet, the State insists that the Maine Legislature can simply legislate around the Fourth Amendment, creating per se exceptions to the warrant requirement where it sees fit. In *McNeely,* the U.S. Supreme Court rejects such categorical exceptions, reaffirming the requirement that any Fourth Amendment analysis be determined on a case-by-case basis. *Missouri v. McNeely*, 133 S.Ct. 1552, 1563 (2013) (Fourth Amendment reasonableness determined by totality of the circumstances). Simply put, Maine's implied consent statute does not, by itself, nullify a citizen's Fourth Amendment rights. In Maine, there **is** a right to refuse to consent to unwarranted searches; it is the Fourth Amendment.

I. *McNeely* changed the landscape of Fourth Amendment consent. The State's brief cites only one post-*McNeely* case.[1] Thus, the State's choice of outdated case-law leads it to conclude that defendant's "almost total reliance on *McNeely* … is wholly misplaced." Red Br. 18. A slew of appellate courts across the country disagree. All have affirmed, in

[1] Other than the Court's grant of certiorari, *Bernard v. Minnesota*, 136 S.Ct. 615 (2015), the State cites to this Court's decision in *State v. Glover*, 2014 ME 49, 89 A.3d 1077, which – though of great importance to this case – does not address the doctrine of consent as impacted by *McNeely*.

light of *McNeely*, that implied consent laws do not categorically obtain valid Fourth Amendment consent. The decisions of the only courts to have said otherwise since *McNeely* are all currently under review by the U.S. Supreme Court. *See Bernard*, 136 S.Ct. at 615 (presenting the question of whether states can criminally punish refusal to submit to an unwarranted – and unconsented – search). And, even the parties in *Bernard* who defend implied consent statutes no longer purport to do so based on the doctrine of consent. (*See e.g.*, Brief of Respondent-Appellee North Dakota at 14, Birchfield v. North Dakota, *consolidated sub nom* Bernard v. Minnesota, No. 14-1468) (U.S. March 15. 2016) ("The arrestee may revoke his consent.…")

Yet, the State persists in citing case-law, such as *South Dakota v. Neville*, 459 U.S. 553 (1983), which shares its pre-*McNeely* conception of consent. Red. Br. 17, 19. Such thinking allows the State to overcome the Fourth Amendment by simple operation of 29-A M.R.S. §2521. Thus, a citizen refusing to submit to a test, in the State's view, makes a "misplaced assertion of his Fourth Amendment rights." Red Br. 13. In other words, the citizen mistakenly invokes "what he *believed to be* his Fourth Amendment right." Red. Br. (emphasis added). In the State's view, "for Fourth Amendment purposes … the defendant's consent, under implied consent, cannot be revoked." Red Br. 17. Indeed, "no such constitutional right existed

for the defendant because he had implicitly agreed to submit to testing when he drove on a Maine road." Red Br. 10.

In addition to the holding of *McNeely*,[2] these views are in contrast to the more-than-four-decades-old case-law that says that any Fourth Amendment consent must be garnered voluntarily in the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). No consent obtained under threat of the implied consent statute's penalties – indeed, coercion is the intent of the implied consent statute – is likely to be voluntary. The State's views are also in conflict with the constitutional principle that "consent to search is not irrevocable, and thus if a person effectively revokes his prior consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier consent." Wayne R. Lafave, Search & Seizure, §8.2(f) (5th ed. 2013). Such are the conclusions of courts in Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Nebraska, Nevada, South Dakota, Tennessee, and Washington – all discussed in defendant's brief.

The State points to nothing to suggest that, in the totality of the circumstances, defendant actually consented to a search, or, even if he had,

[2] The holdings of *McNeely* are discussed at length in defendant's brief so are not discussed in detail here. Blue Br. 21-24.

that he did not decisively revoke that consent through his repeated, vociferous refusals to submit to alcohol testing. The fact that defendant did not consent, after all, was a centerpiece of the State's case.

II. *Glover* instructs that the "minimal probative value" of a defendant's choice to exercise his Fourth Amendment rights is outweighed by its tendency to lead to unfair prejudice. The State seeks to distinguish this case from *Glover* by arguing, again, that defendant had no Fourth Amendment rights to stand on. Red. Br. 10. As discussed, that is the thinking of days past; the State points to nothing to prove that defendant actually consented to a search, or, even if he did consent, that he did not revoke that consent. The State's attempts to distinguish this case from *Glover* on this ground fail.

However, defendant concedes that this case is different from *Glover* for one reason: here, there is a statute purporting to make refusal evidence admissible to prove intoxication. 29-A M.R.S. §2431(3). But that fact is inapposite for an important reason. No matter the Legislature's suggestion that refusal evidence is admissible, such evidence must nevertheless run the gauntlet of the rest of the Rules of Evidence – Rule 403 in particular – before such evidence can be admitted at trial. If the Legislature were to be allowed

to pick and choose special subjects for admissibility regardless of the Rules of Evidence, Maine's constitutional separation of powers would be upended.

The State twice argues - without basis in the record - that evidence of defendant's refusal "is relevant to prove intoxication because the defendant refused to take the tests because he knew he would fail the tests." Red Br. 1, 12. The State's unsupported assumption proves defendant's point; regardless of the actual reasons a citizen refuses to submit to a search, factfinders are likely to assume the worst and "assign much more weight to the defendant's assertion of the right than is warranted." *Glover*, 2014 ME 49, ¶12 (brackets omitted) (citing *United States v. Hale*, 422 U.S. 171, 180 (1975)). Here, this likelihood was all the greater still because the State and the trial court *specifically invited* jurors to make exactly this inference. *See* Blue Br. 4-8.

This Court rejected this very inference in *Glover*: "Invocation of [the Fourth Amendment] has no legitimate bearing on the likelihood that a defendant is guilty of a criminal offense." *Glover*, 2014 ME 49, ¶11. Citizens have numerous reasons for exercising their constitutional rights, yet "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Id*., ¶13 (quoting *Grunewald v. United States*, 353 U.S. 391, 425 (1957). Such a trade-off is not worth the "minimal

probative value" that evidence of a refusal might yield. This calculus is not altered simply because the Legislature purports to make evidence of refusals admissible on the issue of intoxication. 29-A M.R.S. §2421(3). A holding to the contrary would give the Legislature veto power over the Rules of Evidence and the Fourth Amendment.

III. This Court should bar evidence of a defendant's refusal to submit to alcohol testing for purposes of proving intoxication on constitutional grounds. While this Court may follow the path set out in *Glover* – such evidence violates Rule 403 – a better decision would exclude this material on Fourth Amendment grounds. Without such an opinion, defendants' free exercise of a constitutional right will be subject to the whims of an evidentiary balancing test. The Rules of Evidence are an inadequate assurance to a citizen faced with actually invoking his rights or submitting to a warrantless search under penalty of the implied consent statute. This dilemma ultimately chills the exercise of the Fourth Amendment rights. If citizens are told often enough that, "in Maine, there is no right to refuse," as law enforcement and the State repeatedly told defendant and the jury in this case, that statement begins to resemble the truth. If convictions are obtained and sentences increased based on this practice, the Fourth Amendment right to refuse is reduced yet further.

There is no mistake: the State is seeking to penalize defendant's assertion of his Fourth Amendment rights by allowing jurors to convict him of a criminal offense based, in large part, on that assertion. That is the point of allowing the jury to infer an element of the crime from defendant's invocation. In addition, the offense for which defendant was convicted carries a greater minimum period of incarceration for those who refuse testing than those who submit. 29-A M.R.S. §2411(5)(A)(3)(b).

The State chose to emphasize the refusal evidence at trial. *Cf*. Glover, 2014 ME 49, ¶14 (obvious error, in part, because the State emphasized Glover's refusal at trial). The court instructed jurors that defendant's refusal could be used to prove an element of the crime. Without physical evidence of intoxication – evidence it very well could have obtained had Officer Hannon sought a warrant instead of repeatedly warning defendant of the penalties for refusal – the State relied instead on defendant's refusal. This practice makes a mockery of the Fourth Amendment.

The issue of criminal sanctions for a defendant's invocation of his Fourth Amendment right to refuse unwarranted searches is currently before the U.S. Supreme Court in *Bernard*. The Court has not issued an opinion, but at oral argument, several justices closely questioned one Appellee, North Dakota, about such "circularity." Justice Kennedy scoffed:

> You're asking for an extraordinary exception here. You're asking for us to make it a crime to exercise what many people think of as a constitutional right. There is some circularity there. And you could point to no case which allows that.

Transcript of Oral Argument at 47, Bernard v. Minnesota, (decision pending) (No. 14-1468). This Court should not publish such a case.

IV. The trial court unambiguously ruled that any evidence obtained from the Cumberland County Jail was inadmissible. The State's contention that the court's discovery sanction did not exclude all evidence obtained at the Cumberland County Jail misreads the court's plain language and also makes little sense in context of defendant's motion *in limine*/for sanctions.

The trial court ruled:

> The Court recognizes based upon the information provided by counsel that there were issues of discovery with respect to activities at the Cumberland County Jail and the Court has ruled that in the absence of the video as requested, in the normal defense request for discovery, **that the activities and the refusal at the Cumberland County Jail will not be admitted**.

Tr. 5-6 (emphasis added). The court twice mentioned "activities," indicating its intent to exclude evidence of more than just a "refusal" (regardless of

whether "refusal" meant the refusal to submit to alcohol testing or the refusal to sign a Universal Summons and Complaint). It is not a close call.

But even if it were, the "video as requested" depicted much more than just the Intoxilyzer room. Defendant specifically directed his motion to remedy destruction of footage of defendant in "the intake, booking and holding areas" of the Jail. Apdx. 24. Defendant objected to the destruction of potential evidence that "would have shown the defendant moving around the facility, interacting with the police and attempting or refusing a chemical test." Apdx. 24. The State misleadingly excerpts defendant's motion to make it look as if it pertained only to video of defendant "attempting or refusing a chemical test." Red Br. 22 (citing Apdx. 24). That is not the case.

From defendant's point of view, the discovery issue was always about more than "video footage of the intoxylizer room at the Cumberland County Jail," despite the State's characterization on appeal. Red Br. 22. It was about the charge of failing to sign a Universal Summons and Complaint (USAC), too. After all, it was in "the intake, booking and holding areas" of the Jail where the alleged failure to sign the USAC took place. *See* Tr. 56 (Officer Hannon testifies that this occurred inside between "the sally port" and "the prisoner area"). This alleged failure to sign the USAC should have

been depicted on the Jail's video recordings. The court's remedy for the State's failure to produce these videos, therefore, was quite appropriate.

Defendant concedes that this error is unpreserved, but he also maintains that elicitation of evidence specifically excluded by the court is obvious error.

CONCLUSION

For all the foregoing reasons, this Court should vacate defendant's convictions and remand for proceedings consistent with this mandate.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that I caused 10 copies of this Brief to be filed with the office of the Clerk of this Court on May ____, 2016. I further certify that I caused 2 copies to be mailed to opposing counsel at the address listed on the briefing schedule.